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No. 00-1168

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ROYAL DUTCH PETROLEUM COMPANY and THE "SHELL" TRANSPORT AND TRADING COMPANY, P.L.C.,

Petitioners,

v.

KEN WIWA, individually and as Executor of the Estate of his deceased father, KEN SARO-WIWA, OWENS WIWA, BLESSING KPUINEN, individually and as Administratrix of the Estate of her husband, JOHN KPUINEN, and JANE DOE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS AS AMICUS CURIAE SUPPORTING THE PETITION FOR A WRIT OF CERTIORARI

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Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424 (D.N.J. 1999) 8
Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995) 8
Kruman v. Christie's International PLC, 2001 WL 77059 (S.D.N.Y.) 7
Lafontant v. Aristide, 844 F. Supp. 128 (E.D.N.Y. 1994) 8
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Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) 10, 14
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Tachiona v. Mugabe, No. 00-CV-6666 (S.D.N.Y. filed Sept. 6, 2000) 8
Tercero et al. v. C&Y Sportswear, Inc. et al., No. CV 00-12715 (C.D. Cal. filed Dec. 5, 2000) 7
Torres v. Southern Peru Copper Corp., 113 F.3d 540 (5th Cir. 1997) 9
Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528 (1995) 10, 14
Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88 (2d Cir. 2000) 1

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LEGISLATIVE MATERIALS

138 Cong. Rec. S2667-04 (daily ed. Mar. 3, 1992) 12

BOOKS, ARTICLES & TREATISES

Blum, Jeffrey M. & Steinhardt, Ralph G., "Federal Jurisdiction Over International Human Rights Claims: The Alien Torts Act After Filartiga v. Pena-Irala," 22 Harv. Int'l L. J. 53 (1981) 5

TABLE OF AUTHORITIES — Continued

Page(s)

D'Amato, Anthony, Comment, "The Alien Tort Statute and the Founding of the Constitution," 82 Am. J. Int'l L. 62 (1988) 5

Dodge, William S., "The Historical Origins of the Alien Tort Statute: A Response to the 'Originalists,'" 19 Hastings Int'l & Comp. L. Rev. 221 (1996) 5

Kessedjian, Catherine, "International Jurisdiction and Foreign Judgments in Civil and Commercial Matters," Preliminary Document No. 7, 80 (1997) 18

Murphy, Sean D., "Contemporary Practice of the United States," 94 Am. J. Int'l L. 677 (2000) 9

Randall, Kenneth C., "Federal Jurisdiction Over International Law Claims: Inquiries into the Alien Tort Statute," 18 N.Y.U. J. Int'l L. & Pol. 1 (1985) 5

Reimann, Mathias, Conflict of Laws in Western Europe: A Guide Through the Jungle (1995) 18

Schlosser, Peter F., Lecture, "Lectures on Civil-Law Litigation Systems and American Cooperation with Those Systems," 45 U. Kan. L. Rev. 9 (1996) 18

Weintraub, Russell J., "Negotiating the Tort Long-Arm Provisions of the Judgments Convention," 61 Alb. L. Rev. 1269 (1998) 18

Weintraub, Russell J., "The United States as a Magnet Forum and What, if Anything, To Do About It," in International Dispute Resolution: The Regulation of Forum Selection 213 (Jack L. Goldsmith ed., 1997) 11

TABLE OF AUTHORITIES — Continued

Page(s)

Zekoll, Joachim, "The Role and Status of American Law in the Hague Judgments Convention Project," 61 Alb. L. Rev. 1283 (1998) 18

INTERNET WEBSITES

http://www.amex.com/about/NonUSAmex.stm 17
http://www.amex.com/dynamic/marketactivity.stm 17
http://www.amex.com/dynamic/marketactivityamex.htm#share 17
http://www.nasdaq.com/about/NonUSoutput_A0.stm 17
http://www.nyse.com/listed/listed.html 17
http://www.nyse.com/pdfs/forlist010206.pdf 17
http://www.shell.com / investor-en / application / 0,5037,30352,00.html (under "4th Quarter and Full Year Reports 2000 Slide Pack") 15

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BRIEF FOR THE UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS AS AMICUS CURIAE SUPPORTING THE PETITION FOR A WRIT OF CERTIORARI

The United States Council for International Business ("U.S. Council") respectfully submits this brief as amicus curiae supporting the grant of the petition for certiorari to review *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000).[1]

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[1] The parties consented to the filing of this brief. Their letters of consent are on file with the Clerk of the Court. Counsel for a party did not write any part of this brief. No one other than the U.S. Council, its members, and its counsel made a monetary contribution to the preparation or submission of the brief.

INTEREST OF AMICUS CURIAE

The U.S. Council has a substantial interest in urging the Court to grant review in this case. The U.S. Council is a trade association of approximately 300 global corporations, accounting firms, law firms, and business associations. The objectives of the U.S. Council are to advance the global interests of U.S. businesses at home and abroad by promoting an open system of world trade, finance, and investment. International affiliates of the U.S. Council have official consultative status on behalf of world business at bodies of the United Nations, the Organization for Economic Cooperation and Development, and the World Trade Organization. As the U.S. affiliate of the International Chamber of Commerce, the U.S. Council has a long-standing role and interest in the efficient settlement of international commercial disputes. The U.S. Council's interest in having the Court review the correctness of the decision below arises from these goals of fostering open world trade and developing widely acceptable methods of resolving international legal disputes.

SUMMARY OF ARGUMENT

The Court should review the Second Circuit's decision because it addressed important issues of federal law and reached conclusions that are inconsistent with decisions of this Court and other federal appellate courts. The Second Circuit decided that, in a case based on the Alien Tort Claims Act, 28 U.S.C. § 1350 ("ATCA"), the United States has a policy interest in providing a forum for the adjudication of international human rights abuses and therefore that other factors in a forum non conveniens ("FNC") analysis must tilt strongly toward litigation in the foreign forum to justify dismissal. The Second Circuit's decision to restrict the use of FNC in cases based on the ATCA, especially when, as here, an adequate alternative

forum has been found to exist, has broad and important implications for U.S. foreign relations, the relationship between U.S. courts and the courts of foreign countries, and international business and commerce. In addition, the Second Circuit's approach is contrary to the stricter analysis other federal courts apply to determine whether specific statutory language sufficiently manifests a congressional intent to reduce or eliminate the use of FNC.

The Second Circuit also held that it possessed general personal jurisdiction over two foreign corporations based on nothing more than a listing on the New York Stock Exchange and a single "agent," employed by a second-tier subsidiary, who conducted limited investor relations activities in New York. This holding exposes thousands of foreign and out-of-state domestic companies and their assets to the exorbitant general jurisdiction of New York courts, aggravates jurisdictional conflicts between the United States and its trading partners, and contradicts the conclusions of other Circuits on the constitutionally permissible reach of general personal jurisdiction over a parent corporation based on the limited activities of an agent in the forum.

Equally important is the combined effect of the Second Circuit's positions on these two issues. Left unreviewed and uncorrected, the law in the Second Circuit would dramatically increase the availability of that jurisdiction as a forum to resolve international law disputes occurring between aliens anywhere in the world when the disputes have no serious connection with the jurisdiction or the United States.

ARGUMENT

The U.S. Council addresses two of the questions presented in the petition for certiorari. They are whether the use of the FNC doctrine should be restricted in ATCA cases in the way the Second Circuit required and whether a

foreign corporation with an agent conducting limited activities in a forum jurisdiction should be subject to general personal jurisdiction as a result of those activities. The Court should review both of these issues because they are important questions of federal law having significant consequences for foreign relations, the international legal system, and business and commerce and because the federal courts of appeals have reached conflicting decisions on the questions.

The Second Circuit decision is particularly worthy of this Court's review because of the combination of the Second Circuit's approach to exercising general jurisdiction based on agency and to restricting the availability of FNC dismissals in international law cases. The decision would make the Second Circuit a world-wide center for litigating international law controversies having no or insufficient connections with the United States or U.S. sovereign interests. This Court has previously expressed concern about limiting the availability of FNC when "none of the parties are American" and "there is absolutely no nexus between the subject matter of the litigation and the United States."[2]

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[2] See Piper Aircraft Co. v. Reyno, 454 U.S. 235, 251 n.17 (1981).

I. THE COURT SHOULD REVIEW THE SECOND CIRCUIT DECISION BECAUSE DETERMINING THE APPROPRIATE ROLE FOR THE FORUM NON CONVENIENS DOCTRINE IN ALIEN TORT CLAIMS CASES IS AN IMPORTANT ISSUE OF FEDERAL LAW ABOUT WHICH THE COURTS OF APPEALS ARE DIVIDED.

The Second Circuit altered this Court's established FNC analysis by deciding that, in an ATCA case,[3] the United States has a policy interest in providing a forum for the adjudication of international human rights abuses and therefore that other factors in an FNC analysis must tilt strongly toward litigation in the foreign forum to justify dismissal. The Second Circuit's decision to stifle the use of FNC in cases based on the ATCA, especially when, as here, an adequate alternative forum has been found to exist, has broad and important implications for U.S. foreign relations, the relationship between U.S. courts and the courts of foreign countries, and international business and commerce. The decision is also at odds with the way other courts of appeals apply the FNC doctrine.

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[3] Some of the commentary on the ATCA includes: Kenneth C. Randall, "Federal Jurisdiction Over International Law Claims: Inquiries into the Alien Tort Statute," 18 N.Y.U. J. Int'l L. & Pol. 1 (1985); Anthony D'Amato, "The Alien Tort Statute and the Founding of the Constitution," 82 Am. J. Int'l L. 62 (1988); William S. Dodge, "The Historical Origins of the Alien Tort Statute: A Response to the 'Originalists,'" 19 Hastings Int'l & Comp. L. Rev. 221 (1996); Jeffrey M. Blum & Ralph G. Steinhardt, "Federal Jurisdiction Over International Human Rights Claims: The Alien Torts Act After Filartiga v. Pena-Irala," 22 Harv. Int'l L. J. 53 (1981).

A. The Second Circuit Decision To Cramp the Use of Forum Non Conveniens in Alien Tort Cases Raises Important Questions of Federal Law Having Implications for U.S. Foreign Relations, the International Legal System, and International Commerce.

The Second Circuit's FNC analysis raises an important issue of federal law for several reasons.[4]

First, the number of U.S. cases premised on the ATCA is increasing significantly, and, because the statute applies only to alien plaintiffs alleging a tort in violation of a treaty of the United States or international law, these cases often raise serious questions about whether the litigation should occur in the United States. Since 1989, over 110 reported federal court decisions referred to the ATCA, and many of these reported cases were suits by non-resident aliens against primarily foreign defendants for activities occurring in a foreign country.

A few examples illustrate these points. Each of these cases was brought in federal court with the ATCA as at least one principal basis for the action:

- In December 2000, Nicaraguan workers sued a jeans factory located in Nicaragua, the company's Taiwanese parent, and the company's U.S. subsidiary (its alleged agent) for alleged violations of labor rights and rights of free expression in Nicaragua. The complaint also claims that Nicaraguan government officials worked in

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[4] The Court has not reviewed the proper role and application of the FNC doctrine since *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), nearly 20 years ago. In that time, the doctrine has increased in importance with the rapid increase in the internationalization of business, trade, and tourism. An electronic search of the decisions of the federal courts of appeals and state courts of last resort in 1999, 2000, and 2001 reveals a reference to FNC in 132 cases.

concert with the company to deny the union leaders' human rights.[5]

- In 2000, residents of Papua New Guinea sued Australian and British mining concerns in California alleging environmental and human rights violations in Papua New Guinea.[6]
- In 1996, U.S. and foreign citizens alleging world-wide classes sued several Swiss banks in New York alleging that the conduct of the banks in Switzerland during and after World War II unlawfully benefited from Nazi persecution of certain groups, looting, and slave labor.[7]
- Over the last several years, more than 60 lawsuits were filed asserting claims against German companies arising out of World War II and the National Socialist era. Many of these cases were brought by aliens as purported class actions alleging violations of international law.[8]

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[5] Tercero et al. v. C&Y Sportswear, Inc. et al., No. 00-CV-12715 (C.D. Cal. filed Dec. 5, 2000).

[6] Sarei v. Rio Tinto plc, No. 00-CV-11695 (C.D. Cal. filed Nov. 2, 2000).

[7] See In re Holocaust Victim Assets, Master Dkt. No. CV-96-4849 (E.D.N.Y.).

[8] See, e.g., In re Nazi Era Cases Against German Defendants Litigation, MDL No. 1337, No. CV-98-4104 (D.N.J.); In re Austrian & German Bank Holocaust Litigation, 98 CV 3938 (S.D.N.Y.).

Other recent ATCA cases include: Kruman v. Christie's International PLC, 2001 WL 77059 (S.D.N.Y.) (antitrust action under ATCA and Sherman Act against foreign auction houses for conspiracy to inflate prices at auctions in London); Bodner v. Banque Paribas, 114 F. Supp. 2d 117 (E.D.N.Y. 2000) (worldwide descendants of Jewish customers of French banks sued institutions for expropriation of assets in France during World War II); Bano v. Union Carbide Corp., 2000 WL 1225789 (S.D.N.Y.) (Indian citizens brought action for injury from gas leak in India); Beanal v. Freeport-McMoran, Inc., 197 F.3d 161

As the number of ATCA cases grows, a trend that the Second Circuit's decision would surely encourage, identifying the proper role of the FNC doctrine in those cases increases in importance.

Second, the Second Circuit's FNC approach in ATCA cases has potentially serious consequences for the foreign relations of the United States. The defendants in many cases are foreign governments, sitting or former heads of state,[9] or corporations important to foreign economies. Restricting the ability of district courts to dismiss such cases to more convenient and appropriate fora is bound to create and aggravate frictions between the United States and the affected foreign countries.

The Executive Branch confirmed that ATCA cases can threaten U.S. foreign policy interests when it assisted in resolving the U.S. litigation against German corporations

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(5th Cir. 1999) (Indonesian citizen brought action under ATCA and TVPA for alleged human rights abuses in Indonesia); Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424 (D.N.J. 1999) (Belgian citizen sued German manufacturer and U.S. parent for forced labor in Germany during World War II); Roe v. Unocal Corp., 70 F. Supp. 2d 1073 (C.D. Cal. 1999) (former Burmese soldier brought action for work performed on oil pipeline in Burma); Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995) (victims of atrocities in Bosnia suit against the leader of the insurgent Bosnian-Serb forces).

[9] See, e.g., Feng v. Li, No. 00-CV-6446 (S.D.N.Y. filed Aug. 28, 2000) (allegations of abuses by the former head of state of China during the 1989 protests in Tiananmen Square); Tachiona v. Mugabe, No. 00-CV-6666 (S.D.N.Y. filed Sept. 6, 2000) (allegations that the President of Zimbabwe orchestrated and directed a widespread campaign of violence and terror against the people of his own country); Hwang Geum Joo v. Japan, No. 00-CV-2233 (D.D.C. filed Sept. 18, 2000) (class action against the Japanese government alleging rape and abuse by Japanese soldiers during World War II); Lafontant v. Aristide, 844 F. Supp. 128 (E.D.N.Y. 1994) (claims based on the ATCA, the TVPA, and other laws against the individual recognized by the United States as then sitting lawful head-of-state).

for conduct during the Nazi era. The U.S. government stated that the "President of the United States has concluded that it would be in the foreign policy interests of the United States for [a German foundation administering a fund] to be the exclusive forum and remedy for the resolution of all asserted claims against German companies arising from their involvement in the National Socialist era and World War II ...."[10]

Another example is a case brought by Peruvian citizens against several corporations alleging harm from smelting and refining operations in Peru. Peru protested the lawsuit, maintained that the litigation implicated some of its most vital interests, and vigorously asserted that the case implicated foreign policy issues. The Fifth Circuit affirmed a dismissal on FNC and international comity grounds.[11]

Third, the proper application of the FNC doctrine and the preservation of its flexibility[12] are essential to maintaining an appropriate relationship among U.S. courts, the courts of foreign countries, and the international legal system. In a decision starkly conflicting with the decision below, Justice (then Chief Judge) Breyer explained the need to avoid restricting the availability of FNC even in cases

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[10] See Sean D. Murphy, Contemporary Practice of the United States Relating to International Law, 94 Am. J. Int'l L. 677, 685 (2000) (reprinting excerpts of agreements to resolve the disputes).

[11] Torres v. Southern Peru Copper Corp., 113 F.3d 540, 542-43 (5th Cir. 1997). The claims were based on municipal law and not the ATCA. Other cases use the ATCA for similar types of allegations. See, e.g., Bano v. Union Carbide Corp., 2000 WL 1225789 (S.D.N.Y.) (alleging violations of international environmental rights under the ATCA for injuries from a gas leak in India).

[12] See Piper Aircraft Co. v. Reyno, 454 U.S. 235, 249 (1981) (the Court's FNC "decisions have repeatedly emphasized the need to retain flexibility").

premised on important federal statutes such as the securities laws:

> The growing interdependence of formerly separate national economies, the increased extent to which commerce is international, and the greater likelihood that an act performed in one country will affect citizens of another, all argue for expanded efforts to help the world's legal systems work together, in harmony, rather than at cross purposes. To insist that American courts hear cases where the balance of convenience and the interests of justice require that they be brought elsewhere will simply encourage an international forum-shopping that would increase the likelihood that decisions made in one country will cause (through lack of awareness or understanding) adverse effects in another, eroding uniformity or thwarting the aims of law and policy.[13]

The Court should review the Second Circuit decision to ensure that U.S. courts allow other courts to contribute to the development of international law and accord due respect and deference to other courts and nations that could have significant interests in litigating ATCA cases.[14]

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[13] Howe v. Goldcorp Investments, Ltd., 946 F.2d 944, 950 (1st Cir. 1991).

[14] See Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 537 (1995) (because a federal statute was modeled on an international convention, U.S. courts should not interpret the statute in a way that would prevent reference to an arbitral tribunal and would "disparage the authority or competence of international forums for dispute resolution"); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 638 (1985) (U.S. courts should shed "their customary and understandable unwillingness to cede jurisdiction of a claim arising under domestic law to a foreign or transnational tribunal.").

Fourth, the Second Circuit's FNC approach in ATCA cases, especially when joined with the exorbitant position on general personal jurisdiction, has potentially serious consequences for international trade and investment. Businesses around the world having only the slightest connection with the United States will be subject to the higher costs of the U.S. legal system and to systematically higher U.S. damage awards for conduct occurring entirely in a foreign country.[15] Both foreign and domestic companies conducting business outside of the United States will face increased burdens and obstacles in transferring litigation to a more appropriate forum. These risks and potentially higher costs could skew or deter trade and investment decisions.

For all these reasons, the Second Circuit's *Wiwa* decision on FNC in ATCA cases is an important issue of federal law that the Court should review. We now explain that, in addition, the reasoning of the court below departs from the FNC analysis other courts of appeals and this Court apply.

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[15] See Russell J. Weintraub, "The United States as a Magnet Forum and What, if Anything, To Do About It," in International Dispute Resolution: The Regulation of Forum Selection 213, 216 (Jack L. Goldsmith ed., 1997) ("Plaintiffs flock to United States courts for two elementary reasons — higher recoveries and lower barriers to suit.") (footnote omitted); Piper Aircraft Co. v. Reyno, 454 U.S. 235, 252 n.18 (1981) (listing reasons why the U.S. legal system and courts are attractive to foreign plaintiffs); Alcoa Steamship Co. v. M/V Nordic Regent, 654 F.2d 147, 159 (2d Cir. 1980) (en banc) (potential recovery in the United States was $8 million while the recovery in alternative forum was limited to $570,000).

B. The Second Circuit Decision Is Inconsistent with the Decisions of Other Federal Courts on the Circumstances in Which the Existence of Claims Based on a Federal Statute Prevents a Forum Non Conveniens Dismissal.

Although the FNC doctrine generally works well in many cases, this case presents one of the areas in which courts have reached conflicting results: the circumstances in which the existence of a federal statutory claim prevents dismissal in favor of a foreign forum. The Second Circuit concluded that the ATCA as supplemented by the enactment of the Torture Victim Protection Act ("TVPA"), 28 U.S.C. § 1350 note, expresses a policy favoring receptivity by U.S. courts to actions alleging violations of international law and that this policy weighs heavily in an FNC analysis in such actions.[16] As the petition pointed out, this conclusion directly conflicts with the Ninth Circuit's statement that FNC is available in ATCA cases.[17] On a broader level, however, the Second Circuit's approach to FNC issues in federal statutory cases is contrary to the stricter analysis other federal courts apply to determine whether specific statutory language sufficiently manifests a congressional intent to reduce or eliminate the use of FNC.

As mentioned above, the First Circuit's decision in a federal securities case contrasts with the reasoning of the

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[16] As briefs on the merits would discuss in detail, the better view of the intent of Congress is that the TVPA did not supplant the use of FNC in TVPA or ATCA cases. For example, section 2(b) of the TVPA by its terms prefers adjudications outside of the United States. See also 138 Cong. Rec. S2667-04, 2668 (daily ed. Mar. 3, 1992) (statement of Sen. Specter: "Nothing in [the TVPA] is intended to or does affect the doctrine of forum non conveniens, which remains applicable to any lawsuit brought under this act.").

[17] Pet. at 15; In re Estate of Marcos Human Rights Litig., 978 F.2d 493, 500 (9th Cir. 1992).

Second Circuit. In *Howe v. Goldcorp Investments, Ltd.*, the court rejected the argument that "special legal circumstances," that is, a venue provision in the federal securities laws broadening a plaintiff's choice of forum beyond those permitted in the general venue statute, deprived a court from using the FNC doctrine.[18] This reliance on an explicit statutory argument was much stronger than the use of the policy interest the Second Circuit derived in *Wiwa* but nonetheless still was not sufficient to prevent the use of FNC.

Other courts have soundly rejected arguments that a variety of other federal statutory claims are not subject to dismissal on FNC grounds. These federal statutes include the Lanham Act on protection of copyrights and the Racketeer Influenced and Corrupt Organizations Act.[19] Courts invoke FNC in cases based on these statutes even though the United States has a strong policy interest in having U.S. courts apply these critical statutes to ensure their proper application and enforcement. The U.S. policy interest in keeping these cases in U.S. courts is at least as strong as the policy the Second Circuit found reflected in the ATCA and the TVPA.

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[18] 946 F.2d 944, 948-50 (1st Cir. 1991).

[19] See Lockman Foundation v. Evangelical Alliance Mission, 930 F.2d 764, 768-69 (9th Cir. 1991) (citing other cases); see also Alpha Therapeutic Corp. v. Nippon Hoso Kyokai, 199 F.3d 1078 (9th Cir. 1999) (applying FNC to tort claims in a U.S. court pursuant to the Foreign Sovereign Immunities Act but concluding that the claims should not be dismissed), withdrawn pursuant to stipulation of the parties, 2001 WL 28095; Creative Tech., Ltd. v. Aztech Sys. Pte. Ltd., 61 F.3d 696 (9th Cir. 1995) (dismissal of federal copyright claims on FNC grounds in favor of parallel proceeding in Singapore based on Singapore law). A panel of the Second Circuit different from the *Wiwa* panel applied FNC to U.S. antitrust claims. Capital Currency Exchange, N.V. v. National Westminster Bank PLC, 155 F.3d 603 (2d Cir. 1998).

The decisions of this Court and lower courts enforcing arbitration agreements and forum selection clauses in cases based on federal statutes also conflict with the Second Circuit's *Wiwa*-analysis. An example is *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, where the Court considered whether a foreign arbitration clause lessened liability in violation of a provision of the Carriage of Goods by Sea Act. Not unlike an opposition to a motion to dismiss on FNC grounds, the argument in *Sky Reefer* was that the higher costs and inconvenience associated with an arbitration in a foreign country would result in lessened liability. Rather than find that the statutory provision evinced a policy to retain COGSA cases in U.S. courts, the Court examined the international context of the statute and the case and decided to enforce the arbitration clause.[20]

This conflict between the Second Circuit's use of the ATCA to limit FNC dismissals and the willingness of other federal courts to dismiss cases based on important federal statutes in favor of foreign tribunals is another reason the Court should review the Second Circuit's decision.

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[20] 515 U.S. 528, 533-39 (1995). See also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 638 (1985) (referring U.S. antitrust claims to arbitration); Bonny v. Society of Lloyd's, 3 F.3d 156 (7th Cir. 1993) (referring U.S. securities and fraud claims to English courts); Riley v. Kingsley Underwriting Agencies, 969 F.2d 953 (10th Cir. 1992) (referring U.S. and state law securities claims to English court and to arbitration in England).

II. THE COURT SHOULD REVIEW THE SECOND CIRCUIT DECISION BECAUSE EXERCISING GENERAL PERSONAL JURISDICTION BASED ON THE LIMITED ACTIVITIES OF AN AGENT IS AN IMPORTANT FEDERAL CONSTITUTIONAL ISSUE ON WHICH THE COURTS OF APPEALS ARE DIVIDED.

The Second Circuit held that the Due Process Clause permitted it to exercise general personal jurisdiction over two foreign corporations that have no operational activities in the forum but that list securities on U.S. exchanges and have an investor relations program operated in New York by one employee of a second-tier U.S. subsidiary. The courts below found the investor relations program and employee to be a general agent of the foreign corporations, even though the budget of the investor relations program was less than .00004 of the company's total net income for 2000.[21] This holding merits the Court's review because it presents an important federal constitutional question concerning general personal jurisdiction based on the conduct of an agent. The holding also differs from the conclusions reached by other courts of appeals.

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[21] The Second Circuit observed that the Royal Dutch-Shell Investor Relations Program has an annual budget of approximately $500,000 per year. (Pet. App. A-6 & 11.) Financial statements filed with the SEC by the Royal Dutch-Shell group showed total net income for the company to be $12.719 billion for the year 2000. http://www.shell.com/investor-en/application/0,5037,30352,00.html (under "4th Quarter and Full Year Reports 2000 Slide Pack"). Thus, the Investor Relations Program constitutes approximately .000039311 of Shell's total annual business.

A. The Second Circuit's Decision on General Personal Jurisdiction Presents an Important Federal Constitutional Issue That has Not Been, But Should Be, Settled by This Court.

This Court has never addressed whether or under what circumstances a foreign corporation with an "agent" conducting limited activities in the forum may be subject to general personal jurisdiction as a result of those activities.[22] Consequently, as we discuss later, lower courts have applied inconsistent standards and reached inconsistent results. Furthermore, this Court has ruled on general jurisdiction over out-of-state corporations only twice in the last 65 years,[23] and it has not ruled on personal jurisdiction in an international case since *Asahi Metal Industry Co. v. Superior Court*, which concerned specific, not general, personal jurisdiction.[24] For this and the following reasons, review by this Court of the Second Circuit's general personal jurisdiction conclusion would be timely and appropriate.

First, the Second Circuit's expansive construction of the Due Process Clause exposes thousands of domestic and foreign businesses to legal actions in New York based on events occurring anywhere in the world. The New York Stock Exchange, the American Stock Exchange, and the

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[22] In 1925, the Court ruled in Cannon Mfg. Co. v. Cudahy Packing Co., 267 U.S. 333 (1925), that the presence of a subsidiary corporation in a state does not confer personal jurisdiction over a parent. Id. at 337. The Court concluded that courts must acknowledge the formal separation between parent and subsidiary companies and that the degree of control exercised by the parent company has no significance in the absence of any applicable statute. Id.

[23] Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408 (1984); Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952).

[24] 480 U.S. 102 (1987).

NASDAQ together list over 8,000 companies on their exchanges.[25] Of course, the vast majority of domestic listings on those exchanges are companies not incorporated or based in New York, and over 975 listings and ADRs are non-US companies.[26] As a result of the Second Circuit's decision, the thousands of non-New York companies — domestic or foreign — with a single person in New York conducting limited investor relations or any other limited activity may be sued on a claim arising anywhere in the world in the courts of New York. Those courts could also exercise general jurisdiction based on limited agency activity occurring anywhere in the United States when Federal Rule of Civil Procedure 4(k)(2) applies.

Second, a necessary corollary of the exorbitant personal jurisdiction of the Second Circuit is that all the U.S. assets of any person subject to legal action in New York are at risk. A judgment from a court within the Second Circuit entered against a foreign person could be enforced throughout the United States under 28 U.S.C. § 1963 or the Full Faith and Credit Clause and 28 U.S.C. § 1738.

Third, the threat of U.S. legal actions, judgments, and executions against U.S. assets raises the serious prospect of deterring foreign businesses from investing in the United States and making U.S. markets for securities, goods, and services less attractive. Foreign corporations that believe that their assets are in jeopardy by a judgment based on

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[25] http://www.nyse.com/listed/listed.html (3,025); http://www.amex.com/dynamic/marketactivityamex.htm#share (780); http://www.amex.com/dynamic/marketactivity.stm (4,335); see Declaration of Professor John C. Coffee, Jr. (Pet. App. H) ¶ 13.

[26] http://www.nyse.com/pdfs/forlist010206.pdf (432); http://www.amex.com/about/NonUSAmex.stm (55); http://www.nasdaq.com/about/NonUSoutput_A0.stm (488); see Declaration of Professor John C. Coffee, Jr. (Pet. App. H) ¶ 13.

activity wholly unrelated to the United States will be discouraged from placing their assets here.[27] Some foreign corporations may decide not to list or even to de-list their securities from U.S. exchanges.[28]

Fourth, as with the FNC question, the exercise of general jurisdiction based on the limited activities of an agent raises concerns about the role of U.S. courts in the international judicial system. Foreign governments and scholars have criticized the doctrine of general jurisdiction by agency as exorbitant jurisdiction.[29] The Second Circuit apparently disregarded these objections, but they deserve serious consideration in view of this Court's admonition that "[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field."[30]

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[27] Declaration of Professor John C. Coffee, Jr. (Pet. App. H) ¶¶ 6-8.

[28] Id. ¶ 7.

[29] Peter F. Schlosser, Lecture, "Lectures on Civil-Law Litigation Systems and American Cooperation with Those Systems," 45 U. Kan. L. Rev. 9, 9 (1996); Joachim Zekoll, "The Role and Status of American Law in the Hague Judgments Convention Project," 61 Alb. L. Rev. 1283, 1294-95 (1998); Catherine Kessedjian, "International Jurisdiction and Foreign Judgments in Civil and Commercial Matters," Preliminary Document No. 7, 80 (1997); Mathias Reimann, Conflict of Laws in Western Europe: A Guide Through the Jungle, 77-78 (1995); Russell J. Weintraub, "Negotiating the Tort Long-Arm Provisions of the Judgments Convention," 61 Alb. L. Rev. 1269, 1277-78 (1998).

[30] Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 115 (1987) (internal quotations and citations omitted).

B. The Second Circuit's Decision To Exercise General Jurisdiction over a Foreign Corporation Based on the Limited Activities of an Agent Conflicts with the Conclusions of Other Circuits.

The final reason the Court should review the decision of the Second Circuit is that the conclusion to permit the exercise of general jurisdiction over a foreign corporation based on the limited activities of an agent conflicts with the results other courts of appeals have reached. Decisions from the Fourth and Eleventh Circuits are examples.

The Fourth Circuit case involved a corporation outside of the forum that employed between 17 and 21 promotional and consumer product representatives in the forum for a period of five years. Thirteen of these representatives were residents of the forum. During that time, the corporation sold between $9 million and $13 million in the forum (two percent of the total sales for the company), and made one percent of its purchases there. In addition, the corporation kept samples and promotional materials in the forum, registered and maintained company cars, and held local, regional, and national meetings there. Notwithstanding the continuous presence of agents and assets in the forum, the court held that the agents' limited activity and the parent's limited assets were insufficient to confer general jurisdiction over the defendant.[31] In contrast, the Second Circuit found general jurisdiction over an indirect foreign parent with fewer sales and purchases, fewer agents, and far more limited activity in the forum.

In *Consolidated Development Corp. v. Sherritt, Inc.*, the Eleventh Circuit held that that it lacked general jurisdiction over a Canadian oil company with a subsidiary

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[31] Nichols v. G.D. Searle & Co., 991 F.2d 1195, 1198-1200 (4th Cir. 1993).

in the United States. The Canadian company had three contacts with the United States: (a) it had issued bonds and debentures in the United States, (b) in connection with these offerings, it had appointed an agent for service of process in the United States, and (c) its U.S. subsidiary marketed its products in the United States.[32] The court held that these collective activities did not provide general jurisdiction over the Canadian company.[33] Neither the district nor the appellate court described the activities of the agent in detail, but the differences between the approaches of the Eleventh and Second Circuits indicate the need for this Court to address the appropriate rule for using an agent's conduct as the basis for general personal jurisdiction.[34]

The importance of the federal question, the conflict between the lower courts, and the combined effect of the Second Circuit's decision on general jurisdiction and FNC justify this Court's review.

CONCLUSION

For the reasons set forth above, the Court should grant the petition for certiorari and review the Second Circuit's decision.

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[32] 216 F.3d 1286, 1292-94 (11th Cir. 2000).

[33] Id. at 1294.

[34] See also Glater v. Eli Lilly & Co., 744 F.2d 213, 216-17 (1st Cir. 1984) (no general jurisdiction over an out-of-state corporation with eight employed sales representatives (three of whom lived in the forum) promoting products in the forum).

Respectfully submitted,

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